

IN THE INCOME TAX APPELLATE TRIBUNAL
“C” BENCH : BANGALORE

BEFORE SHRI SUNIL KUMAR YADAV, JUDICIAL MEMBER
AND SHRI ABRAHAM P. GEOERGE, ACCOUNTANT MEMBER

ITA Nos.1362 to 1364/Bang/2012
Assessment years : 2003-04 to 2005-06

The Assistant Commissioner of Income Tax, Central Circle 1(3), Bangalore.	Vs.	M/s. Golf View Homes Pvt. Ltd., No.73/1, 5 th Floor, Sheriff Centre, St. Marks Road, Bangalore – 560 001. PAN: AABCG 4059M
APPELLANT		RESPONDENT

Appellant by	:	Dr. Sibichen K. Mathew, CIT-III(DR)
Respondent by	:	Shri S. Ramasubramanian, CA

Date of hearing	:	26.05.2016
Date of Pronouncement	:	31.05.2016

ORDER

Per Sunil Kumar Yadav, Judicial Member

These are appeals preferred by the Revenue against the common order of the CIT(Appeals)-VI, Bangalore dated 31.7.2012 for the AYs 2003-04 to 2005-06 on a solitary ground that the CIT(Appeals) has erred in fact and in law in holding that the addition cannot be sustained u/s. 153A r.w.s. 153C of the Income Tax Act as no incriminating material to justify the additions made have unearthed during the search.

2. The facts in brief borrowed from the record are that a search was conducted at M/s. India Builders Corporation and others at their residential premises, Diamond District, Airport Road, Bangalore. A notice u/s. 153C was issued to the assessee on 29.12.2008, in response to which the assessee has filed the return declaring income. The AO examined return filed by the assessee and made certain additions.

3. Against the assessment order, the assessee has preferred appeal before the CIT(Appeals) with the submission that during the course of search no incriminating material relating to assessee was found, therefore there was no proper assumption of jurisdiction u/s. 153C of the Act.

4. The CIT(Appeals) examined the claim of the assessee and being convinced with the explanation of the assessee, the CIT(Appeals) held that no incriminating material have been brought on record to justify the disallowances and he accordingly deleted the additions. The relevant observation of the CIT(Appeals) are extracted hereunder for the sake of reference:-

“ I have considered the grounds of appeal, submissions made and remand reports. There are two main issues which emerge –

- a) **Whether the assessment u/s 153A read with section 153C is valid in the absence of any incriminating materials?**
- b) **Whether the additions are justified on merits?**

If the answer to the question (a) is in negative, it is not necessary to discuss the issue on merits. Therefore, I first consider whether the assessment is valid or not (in light of Special Bench Order).

A perusal of records would show that the search and seizure operation took place in June, 2008. The assessment for the following assessment years were completed as per details given below:

A.Y.	Date of Completion of Assessment
2003-04	27.01.2006
2004-05	29.12.2006
2005-06	10.12.2007

It is also seen that for the A.Y. 2003-04 even the appellate proceedings before the Tribunal were completed. The Tribunal passed the order for the A.Y. 2003-04 on 01.11.2007. For the A.Y. 2004-05, the CIT(A) has passed the order on 05.07.2007. Of course, for the A.Y. 2005-06, the appellate proceedings were pending before CIT(A) on the date of search. But subsequently, the appellate proceedings were also completed. In this factual background, it has to be examined whether the assessments for the A.Y. 2003-04 to 2005-06 are pending on the date of search and therefore, abate under 2nd proviso to Section 153A of the Act. The Hon'ble Special Bench of ITAT in All Cargo Global Logistic Ltd Vs. DCIT, Central Circle 44 (Mumbai) considered this question. The Special Bench held that there is nothing in the proviso to suggest that even completed assessments abate. The Tribunal held that a completed assessment cannot abate. I would like to quote the following relevant observations from the judgment.

Para 53 of Page no.60

- a. In so far as pending assessments are concerned, the jurisdiction to make original assessment and assessment u/s 153A merge into one and only one assessment for each assessment year shall be made separately on the basis of the

findings of the search and any other material existing or brought on the record of the AO.

- b. In respect of non-abated assessments, the assessment will be made on the basis of books of account or other documents not produced in the course of original assessment but found in the course of search, and undisclosed income or undisclosed property discovered in the course of search.

Para 55 (b) of Page no.62

Again our decision does not come in conflict in any manner with this decision as it is held that only such material which was not produced before the AO, undisclosed income or asset, if found in the course of search, has to be taken into account.

Para 55 (c) of Page no.63.

We have also seen that interpretation placed by us does not violate any principle of natural justice. Further, it does not produce irrational, absurd or wholly unjust results, rather it produces a very valid result that undisclosed income or asset, books of account or documents not produced in the course of regular assessment should be taken into account.

Para 55(d) of Page no.64

We have read the provision of section 132 (1) and 153A together, which are in the nature of cause and effect and therefore in our humble opinion we have rightly read them together. Reading section 153A in isolation and as interpreted by the Ld. Standing Counsel would have the effect that in case of an assessment, which is not pending and where nothing is found, the same may be reopened. Such interpretation will produce a result that an assessment which has come to an end and for which there is no cause of reopening shall revive simple because a search has been conducted. According to us, this will not be harmonious interpretation of various provisions of sections 132(1) and 153A.

Para 55 (g) of Page no.66

The avowed purposes of search have already been stated by us. In cases decided u/s 147 or 263, the scope of assessment is narrower than the scope of original assessment. This is because matters

which has been discussed and debated in assessment, which has become final, and for which there is no reason to agitate again in the re-assessment, there is no reason to reopen them. This consideration would be applicable in the applicable in the re-assessment u/s 153A and guidelines can be clearly discerned in the provision contained in 132(1)

Para 55 (h) of Page no.67

There is no word in the provision to the effect that even completed assessments abate. Therefore, sanctity of such assessment should be maintained except when something is found in search which go against such sanctity.

Para 56 (e) of Page no.71

In the case of Shaila Aggarwal decided by the Hon'ble Allahabad High Court, it has been held that only such assessments or reassessments which are pending on the date of initiation of search stand abated. However, an appeal before the Tribunal against the order of Ld. CIT(A) in respect of Assessment is not a continuation of proceedings of assessment. Such proceedings do not abate, and if the appeal has been disposed off by the Tribunal before the date of initiation of search, the order shall hold. Abatement of any proceedings has serious effects in as much as the abatement takes away all the consequences that arise thereafter. Thus, regular assessment proceedings, which have become final, cannot be abated cannot be set at naught by the Tribunal for making fresh assessment u/s 153A. The consequences of this decision has been taken into account in our finding while deciding the matter regarding scope of re-assessments u/s 153A. \

Para 58 of Page no.73

- (a) In assessments that are abated, the AO retains the original jurisdiction as well as jurisdiction conferred on him u/s 153A for which assessments shall be made for each of the six assessment years separately.
- (b) In other cases, in addition to the income that has already been assessed, the assessment u/s 153A will be made on the basis of incriminating material, which in the context of relevant provisions means - (i) books of account, other documents,

found in the course of search .but not produced in the course of original assessment, and (ii) undisclosed income or property discovered in the course of search.

A reading of the above observations makes it abundantly clear that if an assessment has been completed u/s 143(3), the assessment 153A cannot re-agitate the issues that have become final. Any addition in such assessment in respect of completed assessment that has not abated can be only based on the incriminating material.

Applying the above principle to the facts of present case, I find that the assessments were completed well before the date of search and for a couple of assessment years, even the appeals have been disposed off. Therefore, as held by the Special Bench in All Cargo Logistics Ltd's case, such assessments do not abate. In find that the assessing officer has added the very same amount which was subject matter of earlier year assessment and subject of the appellate proceedings. No incriminating materials have been unearthed during search. The ratio of the Special Bench decision squarely applies to the facts of the present case. I hold that the addition of interest which was the subject matter of earlier assessment and appeal proceedings cannot be sustained.

As far as processing fees is concerned, I find that in the original assessment order u/s 143(3), no disallowance had been made in Order u/s 153A read with Section 153C, the A.O. has disallowed the processing fees. No incriminating materials have been brought on record to justify the disallowance. This disallowance definitely amounts to re-agitating a settled issue which is not permitted as per the decision of the Special Bench. Hence, I delete the addition made on account of processing fees. As I have held that the additions cannot be sustained in the assessment made u/s 153A read with Section 153C of the Act, there is no need to go into the merits of the case. Therefore, the grounds on merit are not dealt with.”

5. Aggrieved, the Revenue has preferred these appeals before the Tribunal and besides placing reliance upon the assessment order, the Id. DR has contended that during the course of search, certain documents

relating to the assessee were found, therefore the AO has rightly issued a notice u/s. 153C of the Act.

6. The Id. counsel for the assessee, on the other hand, has contended that the alleged documents were not confronted to the assessee. Moreover, the assessment in the case of assessee was completed even before the search and the issues on which additions were made in the hands of the assessee while completing assessment u/s. 153A r.w.s. 153C were already examined in the regular assessment. Therefore, the issues which have already been examined cannot be readjudicated while framing an assessment u/s. 153C of the Act. The Id. counsel for the assessee further contended that onus is upon the Revenue to establish as to what incriminating material relating to the assessee was found during the course of search.

7. Having given a thoughtful consideration to the rival submissions and from a perusal of the orders of authorities, we find that there is no indication of the evidence/incriminating material relating to the assessee found during the course of search. During the course of hearing, a specific query was raised to the Id. DR with regard to the incriminating material relating to the assessee found during the course of search. The Id. DR could not explain as to what material relating to the assessee was found. In the absence of any incriminating material relating to the assessee found during the course of search, the provisions of section 153C of the Act cannot be invoked. As

per the provisions of section 153C, notice can only be issued to a person with respect to whom some incriminating material is found and the AO forms a belief that this material relates to the said person. Unless and until the AO forms a belief that such seized material belongs to the third person, the provisions of section 153C cannot be invoked. In the instant case, nothing is brought on record as to what was the incriminating material found during the course of search which relates to the assessee. Therefore, we are of the view that the AO has not assumed jurisdiction to issue notice u/s. 153C of the Act to the assessee. Therefore, we find ourselves in agreement with the findings of the CIT(Appeals). Accordingly, we confirm his order.

8. In the result, the appeals of the Revenue are dismissed.

Pronounced in the open court on this 31st day of May, 2016.

Sd/-

(ABRAHAM P. GEORGE)
Accountant Member

Sd/-

(SUNIL KUMAR YADAV)
Judicial Member

Bangalore,
Dated, the 31st May, 2016.

/D S/

Copy to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT, Bangalore.
6. Guard file

By order

Assistant Registrar,
ITAT, Bangalore.